Supreme Court, U.S.
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No. 07-51

In The

Supreme Court of the United States

WALTER HENRY,
aka "*Money*,"

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE APPLICATION OF THE *BOOKER* REMEDY OPINION HAS RESULTED IN A *DE FACTO* SIXTH AMENDMENT VIOLATION.

II. EXPERT OPINION BASED IN PART ON TESTIMONIAL HEARSAY VIOLATES *CRAWFORD v. WASHINGTON* AND WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON APPEAL BECAUSE THE CLAIM IS PREDICATED ON INTERVENING SUPREME COURT AUTHORITY.

III. IMPROPER ADMISSION OF "EXPERT" TESTIMONY INTERPRETING AMBIGUOUS CONVERSATIONS AS "CODE," WHEN IN FACT IT WAS JUST THE WITNESS'S PERSONAL OPINION BASED ON HIS KNOWLEDGE OF THE CASE, WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

IV. ADMISSION OF GUILTY PLEAS OF NON-TESTIFYING CO-CONSPIRATORS WAS REVERSIBLE ERROR IN BOTH TRIALS AND IS COGNIZABLE ON APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **WALTER HENRY**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in *United States v. Walter Henry,* decided January 12, 2007, rehearing *en banc* denied April 4, 2007.

OPINION BELOW

The decision of the District of Columbia Circuit is reported as *United States v. Walter Henry*, 472 F.3d 910 (D.C. Cir. 2007), and a true and correct copy is included in the Appendix, *infra*.

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Walter Henry*, 472 F.3d 910 (D.C. Cir. 2007). The jurisdiction of this Court to review the judgment of the United States Court of Appeals is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED

Basic Case Facts and Procedural History

This certiorari petition comes after the second appeal in this case. The first appeal resulted in a resentencing. The second appeal followed that resentencing. The second appeal also resulted in an order to remand for a second

resentencing, but that resentencing has not yet taken place. The facts and procedural history of the case are set forth in the opinions on the two appeals. *United States v. Stover*, 329 F.3d 859, 863-864 (D.C. Cir. 2003), *cert. denied*, *Stover v. United States*, 541 U.S. 1018, 124 S.Ct. 2088 (2004), and *United States v. Walter Henry*, 472 F.3d 910 (D.C. Cir. 2007).

This case involves a conspiracy to import heroin from Thailand and other Asian countries and distribute it in the Washington, D.C. and Baltimore areas. The evidence presented at trial established that, from 1995 to 1998, Nuri Lama, a citizen of Nepal residing in New York, arranged to import heroin from Asia into the United States, and delivered the heroin to Petitioner Walter Henry. Henry stored the drugs at his mother's home in Capitol Heights, Maryland, and then sold the heroin to appellant Charles Harrison.

The Government's investigation of the heroin conspiracy produced tapes of more than 250 telephone conversations intercepted on telephone lines belonging to Lama, Henry, and Harrison.

On May 4, 1999, Henry and Harrison and others were charged with one count of conspiracy to possess with intent to distribute one kilogram or more of heroin in violation of 21 U.S.C. § 846. Henry was also charged with two counts of possession with intent to distribute heroin in violation of 21 U.S.C. § 841.

From October 20, 1999 to January 12, 2000, Henry and Harrison were tried by jury. Before trial, Lama pled guilty to having engaged in a conspiracy and provided evidence against Henry and Harrison. Henry was convicted of possession with intent to distribute. The jury was

unable to reach a verdict as to Henry and Harrison on the drug conspiracy count. From September 11 to October 20, 2000, a retrial on the drug conspiracy count against Henry and Harrison took place. The jury returned a guilty verdict as to both Henry and Harrison on the drug conspiracy count. Henry and Harrison were sentenced to life imprisonment.

Henry and Harrison appealed the verdict on various grounds and appealed the sentencing on guideline error grounds. The District of Columbia Circuit Court of Appeals remanded Henry and Harrison for resentencing based on error in the determination of the drug quantity for sentencing guideline purposes but otherwise denied relief on the merits issues. On that first remand Henry and Harrison were both again resentenced to life imprisonment, and both again appealed.

On the second appeal both raised *Booker* related sentencing claims (one a standard *Booker* claim – Henry and Harrison had both been sentenced pre-*Booker* – and the other a challenge to the *Booker* remedy decision and the standard of proof at sentencing under *Booker*), but both also attempted to raise for the first time trial-related issues that had not been raised in the first appeal. There were three trial-related issues.

The first trial-related issue was that in the second trial there had been a witness qualified as an expert in interpreting drug-code language based on his years of experience debriefing drug dealers, etc. That witness "interpreted" the language he heard on hundreds of wiretaps, explaining in essence, that Henry and his alleged coconspirators were talking about drug transactions although the recorded conversations on their face were not

about drugs. Henry argued that this testimony violated *Crawford v. Washington*, 541 U.S. 296, 120 S.Ct. 2348 (2000), because in effect the expert was simply relaying what he had learned from debriefing non-testifying drug dealers who had explained to him what different terms meant in the drug world. *See, e.g., United States v. Buonsignore,* 131 Fed.Appx. 252 (11th Cir. 2005) (an expert may not rely on testimonial hearsay unless the defendant had a prior opportunity for cross-examination of the declarant).

The second trial-related issue was that this same testimony in fact was not interpretation of drug-code language at all but was nothing more than the witness, in the guise of an expert, rendering his commentary or opinion about the case, in effect telling the jury that Henry and Harrison were guilty. This was so because the language at issue was not the standard "code" that one sees in drug trials, but was, if anything incriminating, simply impromptu masked speech, with no code or set definitions involved. This argument was based on a line of cases that has arisen out of the Second Circuit. *See, e.g., United States v. Cruz*, 363 F.3d 187 (2nd Cir. 2003), *United States v. Garcia*, 291 F.3d 127, 139 (2nd Cir. 2002), *United States v. Dukagjini*, 326 F.3d 45, 54 (2nd Cir. 2003) and *United States v. Brown*, 776 F.2d 397, 401 n.6 (2nd Cir. 1985).

The third issue, was that it was reversible error to admit the guilty pleas of certain non-testifying co-conspirators. This issue had been preserved for appeal as to the first trial by a timely objection and the settled law of every circuit was that it was reversible error. There was no conceivable reason other than ineffective assistance of appellate counsel for this issue not to have been raised in the first appeal.

Henry and Harrison had new appellate counsel for the second appeal – counsel who had not represented them on the first appeal.

To overcome the procedural bar that the issues had been waived by not raising them on the first appeal, Henry argued that the *Crawford* issue was cognizable because it derived from supervening new law (*Crawford* had issued after the first appeal),[1] and as to the remaining merits issues (expert improperly passing off mere commentary on the case as if it were interpretation of drug-code language and admission of guilty pleas of non-testifying co-conspirators), that it was ineffective assistance of appellate counsel clear from the face of the direct appeal record to not have raised these issues on the first appeal and hence the court of appeals, in the first instance, should consider the issues under that standard.

As noted, the District of Columbia Circuit Court remanded the case a second time for a *Booker* resentencing but declined to address the merits issues finding them procedurally barred.

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[1] Specifically, Henry argued:

> "Although this issue was not raised in the initial appeal brief in the first appeal, it nevertheless should be heard by this Court, because it is based on supervening Supreme Court authority which issued after the first appeal but prior to Henry and Harrison's conviction becoming final on direct appeal. Supplemental briefing should be permitted on this issue given that the case is not yet final on direct appeal, therefore under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), the appellants should be able to apply the new rule and not be deemed to have waived this issue by not raising it in the first appeal." Henry's initial appeal brief, second appeal, pages 26-27.

Key Facts from the Trials[2]

There were two trials, the first of which resulted in a hung jury as to Henry and Harrison on the primary count, conspiracy to distribute heroin.[3] [Tr. 1/12/2000: 5771-5772; 5781; Docket 293] Henry and Harrison were retried on the conspiracy count and convicted. [Tr. 10/20/2000: 14-15]

There were two differences between the two trials.

In the first trial the alleged source of the heroin, Nuri Lama, testified as a government witness under a cooperation guilty plea agreement. [Tr. 10/26/1999: 295 ff.; Tr. 10/26/1999: 324 ff.] Nuri Lama was extensively and effectively cross-examined about matters relating to his lack of credibility and what he stood to gain by his plea agreement. [*e.g.*, Tr. 10/29/1999: 623 ff.]

Between the first and second trials, however, Nuri Lama died of natural causes. [Tr. 9/22/2000: 90] In the second trial the government did not have Nuri Lama's testimony nor did the defense have his cross-examination to show the jury that Nuri Lama was not credible. Instead of testimony, the government introduced the fact that Nuri Lama had pled guilty to the very same conspiracy that Henry and Harrison were on trial. [Tr. 10/13/2000: 25] This prejudicial evidence was introduced without any offsetting cross-examination.

The second difference between the first and second trials was that in the second trial but not in the first trial,

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[2] Bracketed references are to the record on appeal at the District of Columbia Circuit Court of Appeals.

[3] Henry was convicted at the first trial of two counts of possession of heroin with intent to distribute.

Detective Tyrone Thomas was allowed to testify as an expert [Tr. 9/25/2000: 10; 37] and explain to the jury the meaning of numerous wiretap recorded telephone calls between the alleged co-conspirators. [Tr. 9/25/2000: 81-83; Govt. Ex. 600 (glossary of 87 terms); Tr. 9/26/2000: 105-106 (FBI Agent explains wiretaps using glossary)] Language that was on its face not incriminating was explained by Detective Thomas to be drug-coded conversations consistent with the circumstantial evidence in the case. [Tr. 9/25/2000: 21-24; 82-84; 87] The very same wiretap telephone calls were presented in the first trial as in the second trial, the only difference was the use of a Detective who was qualified as an expert to tell the jury how to interpret the conversations.

The significance of these two differences has to be understood in the context of the overall case presented to the jury in the two trials. The evidence can summarily be described as consisting of four parts: (1) surveillance, (2) the testimony of cooperating co-conspirators including Nuri Lama in the first trial, (3) Nuri Lama's guilty plea standing alone without impeachment in the second trial, and (4) numerous wiretap tape recordings, standing alone in the first trial and interpreted by Detective Thomas in the second trial.

Henry Resentencing

On remand for resentencing Henry objected on *Apprendi* grounds, which were accepted in part, in that the district court reduced the sentences on counts three and four to twenty years but resentenced Henry on the conspiracy count to life. [Tr. 6/10/2004: 6-10]

Harrison Resentencing

During his resentencing hearing on July 21, 2004, Harrison objected to the calculation of the drug quantity and enhancements for role in the offense and possession of a weapon based on *Apprendi* and *Blakely*. The court sentenced Harrison to life imprisonment. *Id* at 28.

The Second Appeal and the Panel Decision

Henry and Harrison attempted in the current appeal, which was a second appeal following remand for resentencing, to raise for the first time merits issues that had not been raised in the first appeal. Recognizing that the general rule prohibits raising issues for the first time on a second appeal, which could have been raised before, Henry and Harrison made two arguments to overcome the procedural bar, as to the first issue raising a *Crawford* claim, that because *Crawford* was intervening authority they should be permitted to supplementally brief it, and as to the remaining two new merits issues, that their prior appellate counsel had been ineffective for not raising the arguments in the first appeal, and that that ineffectiveness could and should be determined from the face of the appellate record.

The panel decision held that Henry and Harrison had not established exceptional circumstances sufficient to overcome the general bar to raising such issues for the first time on a second appeal. The panel concluded as to the *Crawford* issue, that *Crawford* did not address the application of the confrontation rule to expert opinions under Fed.R.Evid. 703, the context of the argument in this case, therefore the Court would not consider it as intervening authority constituting an exceptional circumstance

and as to the ineffective assistance of counsel claims, the panel held that:

> Unlike a claim of ineffective trial counsel that can be made on direct appeal, however, a claim of ineffective appellate counsel can be made only if a "second" appeal occurs – for example, as a result of a resentencing remand. In effect, a fortuity of the judicial process – whether we decide to remand for resentencing – would thus determine whether the defendant has an alternative to collateral review in pursuing an ineffective assistance of appellate counsel claim. . . . We believe a uniform procedure should apply to all defendants with an ineffective assistance of appellate counsel claim and therefore we will not consider such a claim on appeal following remand for resentencing. Instead, a defendant with such a claim must pursue it on collateral review pursuant to 28 U.S.C. § 2255.

United States v. Walter Henry, 472 F.3d 910, 915 (D.C. Cir. 2007).

The panel remanded the case for resentencing of both defendants based on *Booker* error. Neither Henry nor Harrison challenge that remand. The resentencing has not yet taken place.

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

I. The Application Of The *Booker* Remedy Opinion Has Resulted In A *De Facto* Sixth Amendment Violation.

The *Booker* remedy as applied by the federal courts has resulted in a *de facto* violation of the Sixth Amendment, because the lower federal courts have in practical

effect continued to apply the Guidelines in a mandatory fashion. *Booker's* remedy for the Sixth Amendment violation was to excise 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory and replace it with the instruction that the Guidelines, henceforth, would be advisory only.

However, as Justice Scalia predicted, the result has been anything but advisory Guidelines. Instead what has developed in practical application are *de facto* mandatory Guidelines. *See* U.S. Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing, (March 2006), found at http://www.ussc.gov/booker_report/Booker_Report.pdf.

When the practical application of a statute results in a constitutional violation, the court is required to fashion a remedy which prevents the constitutional harm. Whatever the standard of scrutiny applicable to a Sixth Amendment violation, whether strict scrutiny (which we suggest is the appropriate standard), intermediate scrutiny or otherwise, the result of the *Booker* remedy provision has been to *de facto* incorporate mandatory Guidelines back into the sentencing process. The evidence from the Sentencing Commission is not subject to any other reasonable interpretation, and enough cases have been analyzed at this point (over 76,000 post-*Booker* sentencings were studied) to enable us to state with confidence that this has been the effect, intended or not. This has been no remedy – this has been a new wrong.

This Court is familiar with its equitable power to fashion a remedy for governmental action which results in *de facto* constitutional harms. The remedy is clear – until Congress acts to rewrite the sentencing statutes to provide a constitutionally permissible sentencing regime, Mr.

Henry, and others similarly situated, is entitled to resentencing utilizing procedures that *insure* that his Sixth Amendment rights will be safeguarded. *Booker* has notably failed to achieve that requirement.

A proper remedy is not difficult and is easily implemented. Mr. Henry's case should be remanded with instructions that he be resentenced under the applicable Guidelines without, however, the application of any guideline enhancement that was not found by a jury beyond a reasonable doubt as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. This simple mechanism would insure the protection of Mr. Henry's constitutionally guaranteed liberty as no other remedy has or could.

II. Expert Opinion Based In Part On Testimonial Hearsay Violates *Crawford v. Washington* And Was Reversible Error In The Second Trial And Is Cognizable On Appeal Because The Claim Is Predicated On Intervening Supreme Court Authority.

Detective Tyrone Thomas provided the decisive testimony in trial two as an expert witness under Rule 703, Federal Rules of Evidence, "interpreting" 73 "code words" he found in hundreds of wiretap telephone conversations of Henry and his alleged co-conspirators.[4] Detective Thomas's interpretations were based on his years of experience as a narcotics detective in which he debriefed and interviewed hundreds of drug dealers about their

[4] This testimony was excluded in the first trial which resulted in a hung jury on the primary conspiracy count.

activities and language. His interpretations were based on the information provided to him over the years by these unnamed drug dealers, none of whom testified at trial and none of whom were previously cross-examined by Henry and Harrison.

Detective Thomas's expert opinion testimony was predicated on testimonial hearsay as that term is used in *Crawford v. Washington*, and its use violated Henry and Harrison's right to confront and cross-examine the witnesses who were the source of the hearsay. The error was not harmless, as established by the fact that without this testimony the Government was unable to obtain a guilty verdict against Henry and Harrison on the conspiracy charge in the first trial.

Although this issue was not raised in the first appeal, Henry argues that it should have been considered on the second appeal because the argument is based on supervening Supreme Court authority which issued after the first appeal but before Henry and Harrison's judgment and conviction has become final on direct appeal. The error was plain as demonstrated by the alternative outcomes of the first and second trials, accordingly the verdict in trial two and life sentences imposed as a result of that verdict should be reversed, leaving Henry with a conviction and twenty year sentence under the first trial and Harrison without a conviction.

III. Improper Admission Of "Expert" Testimony Interpreting Ambiguous Conversations As "Code," When In Fact It Was Just The Witness's Personal Opinion Based On His Knowledge Of The Case, Was Reversible Error In The Second Trial And Is Cognizable On Appeal Because It Was Ineffective Assistance Of Appellate Counsel For Henry And Harrison's Prior Court Appointed Appellate Counsel To Not Raise The Issue In The First Appeal.

Detective Thomas was allowed to testify as an expert under Rule 703 in the second trial and offer a devastating explanation for the numerous wiretap telephone conversations which otherwise on their face were not incriminating. His testimony was predicated on the Government's argument that the conversations consisted of "code words," which required an expert in drug code to interpret. Except for the *Crawford* issue above, Henry does not dispute the concept that a properly qualified expert in *drug-code words* could be permitted to offer an interpretation of *drug code* given a proper foundation and predicate.

That is not what was done in Henry's trial, however. There were no code words used by Henry or his alleged co-conspirators. The wiretapped conversations were ambiguous and veiled and did not make use of any established code. The language employed was impromptu and off the cuff and not susceptible to interpretation as code by an expert. Detective Thomas's expert opinion was instead based on his knowledge of the case, not his knowledge of a non-existent code. Therefore it was error to allow Detective Thomas to testify as an expert and offer an expert interpretation of the wiretapped conversations. His testimony improperly intruded on the jury's function.

Although this issue was not raised in the first appeal, it should have been considered on the second appeal on the basis that it was ineffective assistance of appellate counsel to fail to raise it in the first appeal. Although there was no objection at trial, the error was plain as demonstrated by the alternative outcomes of the first and second trials.

The legal basis for the objection and the issue on appeal was well established at the time of the trial and first appeal, therefore had the issue been raised in the first appeal it would have been reversible error. Accordingly the verdict in trial two and life sentence imposed as a result of that verdict should have been reversed, leaving Henry with a conviction and twenty year sentence under the first trial and Harrison without a conviction.

IV. Admission Of Guilty Pleas Of Non-Testifying Co-Conspirators Was Reversible Error In Both Trials And Is Cognizable On Appeal Because It Was Ineffective Assistance Of Appellate Counsel For Henry And Harrison's Prior Court Appointed Appellate Counsel To Not Raise The Issue In The First Appeal.

Despite consistent settled authority to the contrary, and strenuous objection at the first trial (but no objection at the second trial), the Government elicited testimony that several alleged *non-testifying* co-conspirators, including in the second trial, the putative Nepalese source of Henry's heroin, Nuri Lama, had pled guilty to the conspiracy charge. This was clearly reversible error in the first trial based on the settled authority prohibiting such evidence and the timely objection of defense counsel. It was equally reversible error in the second trial because it

has been held that the admission of such highly prejudicial evidence is plain error, as indeed it was in this case.

The prejudice in this case is particularly easily demonstrated in the second trial by the alternative outcomes of trials one and two. Nuri Lama testified in trial one, but was so effectively cross-examined that he was not believed by the jury – this is proven by the fact that the jury could not reach a unanimous verdict in trial one on the conspiracy count, yet had Nuri Lama's testimony been accepted it would have established Henry and Harrison's guilt on the conspiracy charge. Nuri Lama died of natural causes between the two trials, so he was not a witness in the second trial, instead the Government presented to the jury only the fact that Nuri Lama had pled guilty to the conspiracy charge.

There was a virtual identity of evidence between the two trials, with the only important exceptions being the admission of Nuri Lama's guilty plea without cross-examination in trial two (and the drug "code" interpretation of Detective Thomas in trial two).

Although this issue was not raised in the first appeal, it should have been considered on the second appeal on the basis that it was ineffective assistance of appellate counsel to fail to raise it in the first appeal. There was a timely objection in the first trial, and although there was no objection in the second trial, the error was plain. The legal basis for the objection and the issue on appeal was well established at the time of the trial and appeal, therefore had the issue been raised in the first appeal it would have been reversible error. Accordingly the District of Columbia

Circuit Court of Appeals erred in denying Henry the right to litigate this issue in his second appeal.

CONCLUSION

WHEREFORE, the Petitioner, WALTER HENRY, respectfully requests this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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472 F.3d 910

United States Court of Appeals,
District of Columbia Circuit.
UNITED STATES of America, Appellee

v.

Walter HENRY, III, A/K/A Money,
A/K/A **Henry** Walker, Appellant
United States of America, Appellee

v.

Charles Harrison, A/K/A Boomie, Appellant.
Nos. 04-3076, 04-3116.

Argued Sept. 14, 2006.
Decided Jan. 12, 2007.
Rehearing En Banc Denied April 4, 2007.

Appeals from the United States District Court for the District of Columbia (No. 98cr00235-04). (No. 98cr00235-05).

William M. Kent argued the cause for appellants. Deborah A. Persico, appointed by the court for appellant Charles Harrison, was on the joint brief for the appellants.

Deborah Watson, Attorney, United States Department of Justice, argued the cause for the appellee. Kenneth L. Wainstein, United States Attorney at the time the brief was filed, was on brief. Roy W. McLeese, III, Assistant United States Attorney, entered an appearance.

Before: HENDERSON, GARLAND and KAVANAUGH, Circuit Judges.

Opinion for the court filed PER CURIAM.

Concurring opinion filed by Circuit Judge HENDERSON.

Concurring opinion filed by Circuit Judge KAVANAUGH.
PER CURIAM.

Having been resentenced on remand from this court, Walter Henry and Charles Harrison again appeal their convictions and sentences stemming from their participation in a conspiracy to import and distribute heroin in the Washington, D.C. and Baltimore, Maryland metropolitan areas. They appeal their convictions on the ground that the trial court committed three evidentiary errors: (1) it admitted expert testimony based in part on testimonial hearsay in violation of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (Claim One), (2) it admitted expert testimony based on unreliable methodology (Claim Two) and (3) it admitted the guilty plea of a non-testifying co-conspirator (Claim Three). Henry and Harrison also argue that they received ineffective assistance of counsel when their appellate counsel failed to raise Claims Two and Three on direct appeal.[1] Finally, Henry and Harrison challenge their sentences on the ground that the district court applied the United States Sentencing Guidelines (Guidelines) in a mandatory fashion in violation of *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). For the reasons set forth below, we conclude that Henry and Harrison waived their evidentiary claims by failing to raise them at trial or on direct appeal. Furthermore, Henry's and Harrison's ineffective assistance of counsel claim must be raised on collateral review, *see* 28 U.S.C. § 2255, if at all. Consistent with our holding in *United States v. Ayers,* 428 F.3d 312 (D.C.Cir.2005), however, we will vacate the sentences

[1] It remains unclear, even after oral argument, whether Henry and Harrison ask us to review Claims Two and Three on the merits or to decide whether failure to raise them on direct appeal constituted ineffective assistance of counsel. *See* Appellants' Br. at 35-36, 40. As a result, we will address both.

and remand for resentencing because we cannot say that the district court's *Booker* error was harmless beyond a reasonable doubt.

I.

We set forth in detail the facts surrounding the heroin conspiracy in *United States v. Stover,* 329 F.3d 859 (D.C.Cir.2003), *cert. denied,* 541 U.S. 1018, 124 S.Ct. 2088, 158 L.Ed.2d 635 (2004). Accordingly, we mention only those matters required for an understanding of the decision. On May 4, 1999, the Government charged Henry, Harrison and other individuals with conspiracy to possess with intent to distribute one kilogram or more of heroin. Nuri Lama, the conspiracy's ringleader, pleaded guilty and thereafter testified as a witness against his co-conspirators at their October 20, 1999 trial. Although the jury convicted Henry of possession with intent to distribute, it failed to reach a verdict on the drug conspiracy count against Henry and Harrison.[2]

On September 11, 2000, Henry and Harrison were retried on the drug conspiracy count. Because Lama had died between the two trials, the prosecution introduced evidence at the second trial that Lama had pleaded guilty to the conspiracy charge. The prosecution also introduced the expert testimony of Metropolitan Police Department Detective Tyrone Thomas who testified about the meanings of various code words used by the co-conspirators during telephone conversations intercepted by the FBI.

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[2] The jury also failed to reach a verdict on the money laundering conspiracy count against Harrison. *Stover,* 329 F.3d at 864. The district court eventually dismissed that count. *Id.*

After a five-week trial, the jury convicted both Henry and Harrison of conspiracy to possess with intent to distribute one kilogram or more of heroin. In determining Henry's and Harrison's sentences under the then-mandatory Guidelines, the district court utilized a formula derived from Detective Thomas's expert testimony to calculate the amount of heroin for which Henry and Harrison were responsible. Based on its calculations, the court found each responsible for 39.4 kilograms of heroin, resulting in a base offense level of 38. The court then added four levels for the leadership roles of both Henry and Harrison in the conspiracy and two levels for possession of a firearm for a total offense level of 44. Combined with Henry's and Harrison's Criminal History Category of I, the Guidelines mandated a sentence of life imprisonment for both and the court sentenced them accordingly.

The co-conspirators, including Henry and Harrison, appealed their convictions and sentences. In *Stover,* we affirmed Henry's and Harrison's convictions but concluded that the district court had erroneously calculated the amount of heroin for which each should be held responsible. Accordingly, we vacated their sentences and remanded to the district court to recalculate the drug quantity. *Stover,* 329 F.3d at 876.

At their resentencing hearings,[3] both Henry and Harrison argued that the Sixth Amendment prohibits judicial calculation of drug amounts at sentencing.[4] The

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[3] Henry's resentencing hearing occurred on June 10, 2004, and Harrison's on July 21, 2004.

[4] Henry cited *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Harrison cited *Blakely v. Washington,* 542

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district court rejected their argument and, based on its revised calculation of the drug amounts, held both Henry and Harrison responsible for 27.3 kilograms of heroin. Again treating the Guidelines as mandatory, the court set both base offense levels at 36. It then added four levels for their managerial roles in the offense and two levels for possession of a firearm for a total offense level of 42. Combined with their Criminal History Category of I, Henry's and Harrison's Guidelines range was 360 months to life imprisonment and the district court again sentenced them to life imprisonment. Henry and Harrison filed timely notices of appeal.

II.

We address separately Henry's and Harrison's evidentiary challenges, their ineffective assistance of counsel claim and their *Booker* challenge.

A. Evidentiary Challenges

Although they failed to raise their evidentiary challenges at trial or on direct appeal, Henry and Harrison argue that we should nevertheless review them for plain error on this appeal after the resentencing remand. *See* Fed.R.Crim.P. 52(b). We disagree.

It is well-settled that "where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Nw. Ind. Tel. Co. v. FCC,* 872 F.2d 465, 470

U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which the Supreme Court decided after Henry's hearing.

(D.C.Cir.1989) (citing *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C.Cir.1984)); *see also United States v. Ben Zvi*, 242 F.3d 89, 95-96 (2d Cir.2001) (applying waiver to second appeal following resentencing remand); *cf. United States v. Adesida*, 129 F.3d 846, 849-50 (6th Cir.1997) (applying waiver at resentencing remand stage). The "widely-accepted" bar promotes procedural efficiency and prevents the "'bizarre result'" that "'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Nw. Ind. Tel.*, 872 F.2d at 470 (quoting *Laffey*, 740 F.2d at 1089-90). Although the "waiver principle is [not] an absolute preclusion to appellate review," *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C.Cir.1995), we have stated that "discretion to waive a waiver is normally exercised only in 'exceptional circumstances, where injustice might otherwise result,'" *id.* at 740 (quoting *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 717 (D.C.Cir.1986)).

Henry and Harrison have not demonstrated "exceptional circumstances" that excuse their failure to raise the evidentiary challenges either at trial or on direct appeal. Regarding Claim One-the allegedly erroneous admission of Thomas's expert testimony based in part on hearsay-Henry and Harrison argue that the *Crawford* decision, which the Supreme Court issued after their direct appeal,[5] created a new legal rule that rendered the testimony inadmissible. While we have suggested that an intervening change in the law can constitute an "exceptional circumstance [ ]" that justifies waiving waiver, *see Crocker,*

[5] We issued *Stover* on May 23, 2003. The Supreme Court decided *Crawford* on March 8, 2004.

49 F.3d at 740, the *Crawford* decision did not effect such a change with respect to the admissibility of Thomas's expert testimony. In *Crawford,* the Supreme Court altered the framework set forth earlier in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and held that the Confrontation Clause of the Sixth Amendment bars "testimonial" hearsay statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. *Crawford,* 541 U.S. at 68-69, 124 S.Ct. 1354. *Crawford,* however, did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703.[6] In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703. Because *Crawford* does not represent an intervening change in the law regarding the admissibility of Thomas's expert testimony, no exceptional circumstance exists and Henry's and Harrison's Claim One is thus waived.

With respect to Claims Two and Three, Henry and Harrison appear to argue that we should address the merits in this appeal because their original appellate counsel acted ineffectively in failing to raise them on direct appeal. *See* Appellants' Br. at 35-36, 40. In particular, Henry and Harrison argue that the trial court erroneously permitted

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[6] Federal Rule of Evidence 703 provides in part: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data *need not be admissible in evidence* in order for the opinion or inference to be admitted." (Emphasis added.)

Detective Thomas to testify about the meanings of terms used by the co-conspirators in intercepted telephone conversations and erroneously admitted evidence that Lama pleaded guilty although Lama himself was unavailable to testify. In order to reach the merits of Claims Two and Three *because* counsel allegedly acted ineffectively, however, we would first need to determine *whether* counsel acted ineffectively. And because an ineffective assistance of appellate counsel claim must ordinarily be made on collateral review, *see* Part II.B *infra,* we decline to consider Henry's and Harrison's original appellate counsel's performance an exceptional circumstance that justifies waiving waiver. Accordingly, we do not reach the merits of Claims Two and Three.

B. Ineffective Assistance of Counsel Claim

Henry and Harrison argue that their original appellate counsel acted ineffectively in failing to raise Claims Two and Three on direct appeal. When a defendant raises an ineffective assistance of *trial* counsel claim for the first time on direct appeal, our "'general practice is to remand the claim for an evidentiary hearing.'" *United States v. Moore,* 394 F.3d 925, 931 (D.C.Cir.2005) (quoting *United States v. Rashad,* 331 F.3d 908, 909 (D.C.Cir.2003)). Other circuits require the defendant to pursue an ineffective assistance of trial counsel claim in collateral proceedings under 28 U.S.C. § 2255. *See, e.g., United States v. Quintero-Barraza,* 78 F.3d 1344, 1347 (9th Cir.1995); *United States v. Matzkin,* 14 F.3d 1014, 1017 (4th Cir.1994). Nevertheless, an ineffective assistance of trial counsel claim can be resolved on direct appeal if the trial record conclusively shows that counsel did or did not perform effectively. *See, e.g., Moore,* 394 F.3d at 931;

Quintero-Barraza, 78 F.3d at 1347; *Matzkin,* 14 F.3d at 1017.

The question here is whether we should similarly treat a claim of ineffective assistance of *appellate* counsel raised in an appeal following a resentencing remand. On the one hand, such a claim is virtually unreviewable on direct appeal as appellate counsel will hardly assert his own ineffectiveness. *Cf. United States v. Weaver,* 281 F.3d 228, 234 (D.C.Cir.2002) (explaining that defendant can, with new counsel, raise ineffective assistance of trial counsel claim for first time on direct appeal because "trial counsel cannot be expected to argue his own ineffectiveness in a motion for a new trial"). Therefore, if the trial record sufficed, we could decide a claim of ineffective assistance of appellate counsel on appeal following a resentencing remand. *Cf. Nw. Ind. Tel.,* 872 F.2d at 470 (explaining that waiver applies "where an argument *could have been raised on an initial appeal*" (emphasis added)); *see also Ben Zvi,* 242 F.3d at 96 (deciding ineffective assistance of appellate counsel claim on appeal after resentencing remand because "the underlying challenge" was "sufficiently presented" and "judicial efficiency would be served"). Unlike a claim of ineffective trial counsel that can be made on direct appeal, however, a claim of ineffective appellate counsel can be made only if a "second" appeal occurs-for example, as a result of a resentencing remand. In effect, a fortuity of the judicial process-whether we decide to remand for resentencing-would thus determine whether the defendant has an alternative to collateral review in pursuing an ineffective assistance of appellate counsel claim. *Cf. Griffith v. Kentucky,* 479 U.S. 314, 327-28, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (applying new Supreme Court rule retroactively in criminal case

because it is "solely the fortuities of the judicial process" that determine case Court chooses to hear first on plenary review). We believe a uniform procedure should apply to all defendants with an ineffective assistance of appellate counsel claim and therefore we will not consider such a claim on appeal following remand for resentencing. Instead, a defendant with such a claim must pursue it on collateral review pursuant to 28 U.S.C. § 2255.

C. Booker Claim

Finally, it is undisputed that the district court sentenced Henry and Harrison by applying the Guidelines in a mandatory fashion to increase his sentence beyond that which could have been imposed based solely on the facts found by the jury which is constitutional error under *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *See United States v. Simpson,* 430 F.3d 1177, 1182-83 (D.C.Cir.2005). Nevertheless, the Government argues that the error was harmless beyond a reasonable doubt and thus a resentencing remand is unnecessary. We disagree.

At their respective resentencing hearings, both Henry and Harrison raised a Sixth Amendment objection to their sentences. Accordingly, we review the sentences for harmless error under Federal Rule of Criminal Procedure 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). That is, the Government must establish "beyond a reasonable doubt that the error complained of did not contribute to the sentence obtained." *United States v. Coumaris,* 399 F.3d 343, 351 (D.C.Cir.2005) (quotation omitted).

The Government maintains that the district court's sentencing error was harmless beyond a reasonable doubt because it imposed the maximum sentence in the Guidelines range notwithstanding its discretion to impose a lower sentence. That is, the district court decided to sentence Henry and Harrison to life imprisonment under a then-mandatory Guidelines range of 360 months to life imprisonment. Relying on Tenth Circuit precedent, Appellee's Br. at 47-48, the Government contends that if a judge imposed the maximum sentence within the then-mandatory Guidelines range, there is no reason to believe he would change the sentence on remand. *See United States v. Riccardi,* 405 F.3d 852, 876 (10th Cir.2005) (sentence imposed at top of Guidelines range pre-*Booker* constitutes harmless error because "[h]aving exercised his limited discretion under the pre-*Booker* system to give [the defendant] the highest permissible sentence, there is no reason to think the judge would exercise his now-greater discretion to reduce the sentence"); *United States v. Waldroop,* 431 F.3d 736, 743 (10th Cir.2005) (citing *Riccardi* for same proposition).

We do not believe that the pre-*Booker* imposition of a sentence at the top of a Guidelines range by itself constitutes harmless error. In *United States v. Coles,* we held that a *Booker* error constitutes plain error if "there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-*Booker* sentencing regime." 403 F.3d 764, 767 (D.C.Cir.2005). In so holding, we recognized that "[t]here undoubtedly will be some cases in which a reviewing court will be confident that a defendant has suffered no prejudice," *id.* at 769, and therefore remand would be unnecessary. For example, if a district judge imposed a

sentence at the statutory maximum "'and [said] that if he could he would have imposed an even longer sentence, there would be no basis for thinking that if he had known that the sentencing guidelines [were] merely advisory he would have given the defendant a lighter sentence.'" *Id.* (quoting *United States v. Paladino,* 401 F.3d 471, 483 (7th Cir.2005)).

We also suggested in *Coles,* however, that the imposition of a sentence at the top of a Guidelines range without "the judge's characterization of the sentence," *United States v. Tchibassa,* 452 F.3d 918, 930 (D.C.Cir.2006), is "hardly conclusive," *Coles,* 403 F.3d at 769. We noted:

> "A conscientious judge-one who took the guidelines seriously whatever his private views-would pick a sentence relative to the guideline range. If he thought the defendant a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range too high."

Id. at 770 (quoting *Paladino,* 401 F.3d at 482). In other words, a trial judge treating the Guidelines as mandatory might have imposed the maximum sentence in a particular range not necessarily because he believed the defendant deserved that sentence but because he considered the defendant to be the most serious type of offender in the range. And if this analysis applies in the *plain error* context, where the burden of proving prejudice is on the defendant, it applies *a fortiori* in the context of constitutional harmless error, where the burden is on the Government to establish no prejudice beyond a reasonable doubt. Thus, we agree with our sister circuits that have held that a sentence at the top of a Guidelines range is not, in itself, enough to establish that a *Booker* error was harmless

beyond a reasonable doubt. *See United States v. Woods,* 440 F.3d 255, 259 (5th Cir.2006); *United States v. Cain,* 433 F.3d 1345, 1348 (11th Cir.2005).

Here, unlike in *Coles,* the defendants raised Sixth Amendment objections in the district court. Because we cannot conclude that the district court would have sentenced Henry and Harrison to life imprisonment irrespective of the mandatory nature of the Guidelines, the Government has not established that the error was harmless. We therefore vacate the sentences and remand for resentencing. *See United States v. Baugham,* 449 F.3d 167, 182-83 (D.C.Cir.2006); *United States v. Brown,* 449 F.3d 154, 159-60 (D.C.Cir.2006); *Ayers,* 428 F.3d at 315-16.

For the foregoing reasons, we affirm Henry's and Harrison's convictions but we vacate the sentences and remand the case to the district court for resentencing under *Booker* and 18 U.S.C. § 3553(a).

So ordered.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring.

I fully agree that we should affirm Henry's and Harrison's convictions. I am less certain, however, that we should remand for a *second* resentencing.

A *Booker* error is prejudicial if "there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-*Booker* sentencing regime."* *United States v.*

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* Although we applied the plain error standard in *Coles,* 403 F.3d at 767, the prejudice inquiry is the same under both the plain and

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Coles, 403 F.3d 764, 767 (D.C.Cir.2005). As *Coles* acknowledges, "[t]here undoubtedly will be some cases in which a reviewing court will be confident that a defendant has suffered no prejudice." *Id.* at 769. In such a case, " 'there would be no basis for thinking that if [the judge] had known that the sentencing guidelines [were] merely advisory he would have given the defendant a lighter sentence,' " *id.* (quoting *United States v. Paladino,* 401 F.3d 471, 483 (7th Cir.2005)), and thus no reason exists to remand for resentencing.

While I agree that a sentence imposed at the top of a Guidelines range does not without more constitute harmless error, the record in this case reveals more. Although the trial judge did not explicitly state that he would have imposed the same sentences were the Guidelines not mandatory, he has twice sentenced Henry and Harrison to the maximum sentence of life imprisonment. He originally imposed the mandatory sentence of life imprisonment. Upon remand for resentencing, the judge again sentenced Henry and Harrison to life imprisonment after calculating a lower Guidelines range of 360 months to life imprisonment. Therefore, the judge not only rejected a lower sentence within a particular Guidelines range, he rejected a lower sentence *in a lower range.* Indeed, a "conscientious judge" who considered mandatory life imprisonment to be excessive would necessarily impose a lighter sentence if a lower mandatory range applied. *See Coles,* 403 F.3d at 770.

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harmless error standards. *See United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (plain error inquiry "normally requires the same kind of inquiry [as harmless error], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice").

Because here the district judge chose not to impose a shorter sentence on the first remand – even with a lower Guidelines range – I believe there is no reason to think that he would reduce the sentence on a second remand with no mandatory Guidelines range.

Furthermore, at least with respect to Harrison, the district judge explained why the life sentence was appropriate. In *United States v. Tchibassa,* under plain error review, we found no prejudice where the district judge imposed the maximum sentence within the Guidelines range and stated that the sentence was "appropriate to serve as a warning to those who will kidnap Americans abroad and *entirely appropriate* for the type of actions that occurred here in depriving [the former hostage] not only of his freedom for two months, but basically of his life." 452 F.3d 918, 930 (D.C.Cir.2006) (quotation omitted) (emphasis original). As we explained in *Tchibassa*:

> The judge's strong and unambiguous approval of the sentence imposed, based . . . on its deterrent effect and its proportionality to the crime committed, makes us confident that were the judge given the opportunity to resentence Tchibassa . . . he would not impose a sentence materially more favorable than the one he made plain he considered "appropriate."

Id. Similarly, the court stated at Harrison's resentencing hearing: The Court finds that a sentence of life is *appropriate in this case* in light of the defendant's boasting of his lifestyle and his lifestyle, and the need for deterrence provides sufficient reason for the maximum penalty. Dealing in this amount of drugs should result in a sentence of life imprisonment, in this Court's view, and that will provide . . . some deterrence in the community if

others were to understand that even though they've never been arrested before, if they deal in this amount of drugs they're going away for the rest of their lives.

7/21/04 Tr. 28-29 (emphasis added). Because the judge offered a "strong and unambiguous approval of the sentence imposed" upon Harrison, I think there is little, if any, reason to believe that he would impose a sentence more favorable to Harrison were he given the opportunity to resentence him. *See Tchibassa,* 452 F.3d at 930.

KAVANAUGH, Circuit Judge, concurring.

I join the Court's opinion and add this concurrence to note a few broader points about the path of post-*Booker* jurisprudence in the federal courts.

To review: In *Booker,* a five-Justice majority of the Supreme Court held that the United States Sentencing Guidelines were unconstitutional under the Fifth and Sixth Amendments to the extent that facts used to increase a criminal sentence (beyond what the defendant otherwise could have received) were not proved to a jury beyond a reasonable doubt. *United States v. Booker,* 543 U.S. 220, 226-27, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.). The logical upshot of this part of *Booker* (what is known as the *Booker* constitutional opinion) is that the Constitution is satisfied by a sentence in which sentencing facts are proved to a jury beyond a reasonable doubt.

In some tension with the *Booker* constitutional opinion, however, a different five-Justice majority of the *Booker* Court also held (in what is known as the *Booker* remedial opinion) that the constitutional problem with the Guidelines is more readily solved not by requiring sentencing

facts to be proved to a jury beyond a reasonable doubt, but instead by making the Guidelines one factor in the district court's sentencing decision, along with other factors specified in 18 U.S.C. § 3553(a). *Id.* at 245-46, 260-61, 125 S.Ct. 738 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ.); *cf. id.* at 302, 125 S.Ct. 738 (Stevens, J., dissenting in part, joined by Scalia and Souter, JJ.) ("[B]y repealing the right to a determinate sentence that Congress established in the SRA, the Court has effectively eliminated the very constitutional right *Apprendi* sought to vindicate."). The *Booker* remedial opinion emphasized, however, that the sentencing court still "must consult" the Guidelines and "take them into account when sentencing." *Id.* at 264, 125 S.Ct. 738. The *Booker* remedial opinion also directed appellate courts to review district court sentences for "reasonableness" – a term not defined, but which the Court stated would help "to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264, 125 S.Ct. 738.

In light of the *Booker* remedial opinion and § 3553(a)'s requirement that district courts "shall consider" the Guidelines, as well as § 3553(a)'s express goal of avoiding unwarranted sentencing disparities, this Court and other federal courts after *Booker* have held that the Guidelines remain central to sentencing. In part because the "reasonableness" of a sentence is not self-defining and because the *Booker* remedial opinion said that appellate review would help maintain uniformity, appellate courts have relied on the Guidelines as the predominant substantive standard against which to measure a sentence's reasonableness. Indeed, many courts of appeals, including this one, have accorded a "presumption of reasonableness" to within –

Guidelines sentences. *See United States v. Dorcely,* 454 F.3d 366, 376 (D.C.Cir.2006); *see generally United States v. Buchanan,* 449 F.3d 731, 735-41 (6th Cir.2006) (Sutton, J., concurring). And appeals courts have found many below – Guidelines sentences to be "unreasonable." The post-*Booker* appellate jurisprudence in turn has exerted further hydraulic pressure on district courts to rely heavily on the Guidelines in sentencing criminal defendants. It thus may be something of a misnomer to call the Guidelines "advisory" with respect to current sentencing practices given that appeals courts often assess the propriety of a district court sentence in part by reference to the Guidelines.

As we review what has happened since *Booker,* there is no denying that the post-*Booker* system in substance closely resembles the pre-*Booker* Guidelines system in constitutionally relevant respects. *See* Michael W. McConnell, *The Booker Mess,* 83 DENV. U. L. REV. 665, 678 (2006) ("All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged."); *see also* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible,* 4 Ohio State J. Crim. L. 37, 53 (2006); Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System,* 43 Hous. L. Rev. 341, 347-55 (2006). Four of the five Justices who joined the *Booker* remedial opinion, including its author Justice Breyer, did not find any constitutional problem with the Guidelines to begin with. So it is understandable that the current system as applied is not a major departure from the pre-*Booker* Guidelines system. *Cf. Booker,* 543 U.S. at 312-13, 125 S.Ct. 738 (Scalia, J., dissenting in part) (stating that *Booker* remedial opinion may convey message that "little has changed" from mandatory Guidelines system and posing question: "Will appellate review

for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?").

To be sure, district and appeals courts now take some additional and important procedural steps (as exemplified again by today's per curiam opinion). But the bottom line, at least as a descriptive matter, is that the Guidelines determine the final sentence in most cases. And notwithstanding the *Booker* constitutional opinion, many key facts used to calculate the sentence are still being determined by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. The oddity of all this is perhaps best highlighted by the fact that courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received – notwithstanding that five Justices in the *Booker* constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt.*

In short, we appear to be back almost where we were pre-*Booker.* And if that is so – and if the lower courts' effort to harmonize the competing goals of the *Booker* opinions has become the jurisprudential equivalent of a dog chasing its tail – it makes sense to examine how current sentencing practices square not just with *Booker* but with underlying constitutional principles.

The disagreement in *Booker* (and in earlier cases such as *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)) represents the collision of two starkly different conceptions of

how the Fifth and Sixth Amendments apply to criminal sentencing.

The first conception of the Fifth and Sixth Amendments, which might be called the "deference-to-legislatures" model, generally defers to legislatures in defining crimes and enacting sentencing schemes. Under this interpretation, the Fifth and Sixth Amendments generally require that a jury find the elements of the crime (as defined by the legislature) beyond a reasonable doubt. As to sentencing, this approach gives legislatures wide discretion in crafting a mandatory or structured sentencing system; or adopting an unstructured system in which each sentencing judge possesses broad authority to assess a sentence based on the individual background, facts, and circumstances of the offense and offender; or choosing some approach in between. *See generally Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (Rehnquist, J.) (opinion of the Court); *Booker,* 543 U.S. at 326-34, 125 S.Ct. 738 (Breyer, J., dissenting in part); *Blakely,* 542 U.S. at 314-26, 124 S.Ct. 2531 (O'Connor, J., dissenting); *id.* at 326-28, 124 S.Ct. 2531 (Kennedy, J., dissenting). Proponents of this approach argue that it has prevailed throughout most of our history, as courts have generally respected and adhered to legislative choices with respect to sentencing schemes. *See Booker,* 543 U.S. at 327-28, 125 S.Ct. 738 (Breyer, J., dissenting in part).

The second conception of the Fifth and Sixth Amendments, which might be termed the "real-elements-of-the-offense" model, rests on the constitutionally central role of the jury in the criminal process. This approach begins with the idea that no logical distinction exists between the

elements of a crime and so-called sentencing facts that are used to increase a sentence. Because the Constitution requires that the Government prove the elements of a crime to a jury beyond a reasonable doubt, the Constitution also requires that the Government prove substantively similar sentencing facts (such as carrying a weapon during commission of a drug crime) to a jury beyond a reasonable doubt. To do otherwise, this view contends, would be to elevate form over substance and allow legislatures to evade the constitutional requirement that the prosecutor prove the elements of the crime to a jury beyond a reasonable doubt simply by re-labeling elements of the crime as sentencing factors. Under this jurisprudential approach, therefore, courts do not defer to a legislative choice to label a fact as a sentencing factor rather than an element of the crime. *See Booker,* 543 U.S. at 226-44, 125 S.Ct. 738 (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.); *Harris v. United States,* 536 U.S. 545, 572-83, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (Thomas, J., dissenting); *Apprendi,* 530 U.S. at 498-99, 120 S.Ct. 2348 (Scalia, J., concurring).

There is an important qualification to this second approach, however, which may explain some of the conceptual and practical difficulty in this area. Despite requiring the jury to find beyond a reasonable doubt the facts used to increase a sentence, the adherents to the real-elements-of-the-offense approach allow purely discretionary sentencing schemes whereby judges "exercise broad discretion in imposing a sentence within a statutory range." *Booker,* 543 U.S. at 233, 125 S.Ct. 738; *see also Apprendi,* 530 U.S. at 481, 120 S.Ct. 2348. This concession creates an apparent anomaly: After all, discretionary sentencing systems appear to pose an even greater concern that key facts used

to increase a sentence are found by judges – on the record or often silently – by a preponderance of the evidence rather than by juries beyond a reasonable doubt. *See Apprendi,* 530 U.S. at 548-49, 120 S.Ct. 2348 (O'Connor, J., dissenting) ("[O]ur approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make the equivalent factual determinations under a determinate-sentencing scheme."); Kevin R. Reitz, *The New Sentencing Conundrum,* 105 Colum. L. Rev.. 1082, 1119 (2005). Because the Court has long upheld discretionary sentencing schemes, Chief Justice Rehnquist stated for the Court in 1986 (before the *Apprendi-Blakely-Booker* cases): "We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance." *McMillan,* 477 U.S. at 92, 106 S.Ct. 2411.

Notwithstanding weighty arguments of the kind made by Chief Justice Rehnquist, the adherents to the real-elements-of-the-offense conception have maintained their approach-and continued to accept discretionary sentencing schemes as a constitutionally acceptable alternative. *See Booker,* 543 U.S. at 233, 125 S.Ct. 738. As a result, the real-elements-of-the-offense approach to the Constitution seems to mean the following: Legislatures may enact: (i) a discretionary sentencing scheme where the sentencing judge has *complete discretion* to impose a sentence within the legal range that applies to the crime found by the jury, and the judge may determine the sentence based on the judge's own subsidiary factual determinations, other

considerations, or no stated rationale at all; *or* (ii) a mandatory sentencing scheme where the sentencing judge has *no discretion* to make factual determinations to increase a sentence. But legislatures, under this real-elements-of-the-offense approach, may *not* enact an intermediate sentencing scheme where the sentencing judge has *structured discretion*-in other words, where the sentencing judge must make factual determinations (such as "Did the defendant carry a gun during the drug transaction?") in order to increase a sentence.

How do post-*Booker* sentencing practices square with the various constitutional approaches described above?

If the deference-to-legislatures conception is correct, then current federal sentencing practices, which largely mirror pre-*Booker* practices, are obviously constitutionally permissible. Indeed, if this conception is correct, then the *Booker* constitutional opinion is incorrect and the Sentencing Guidelines should apply as promulgated and made mandatory by Congress.

If the real-elements-of-the-offense approach is correct, however, then current federal sentencing practices may be in tension with the Constitution. That is because the current system – in practice – works a lot like the pre-*Booker* system: District judges are obliged to apply the Guidelines, and certain facts used to increase a sentence (beyond what the defendant would have received based on the offense of conviction) are found by the judge, not by the jury beyond a reasonable doubt.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-3076 **September Term, 2006**

98cr00235-04
98cr00235-05

Filed On: April 4, 2007 [1032949]

United States of America,

Appellee

v.

Walter Henry, III, *a/k/a* Money, *a/k/a* Henry Walker,

Appellant

Consolidated with 04-3116

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk